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Application of the First Amendment to Violent and Nonviolent Video Games

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APPLICATION OF THE FIRST AMENDMENT TO VIOLENT AND NONVIOLENT VIDEO GAMES

INTRODUCTION

Imagine following a rugged American soldier during World War II as he infiltrates the Axis frontlines on a dangerous mission. He and his allies carefully and strategically battle the enemy forces on the lush landscape. The hero skillfully avoids enemy fire while directing his squad and targeting enemy soldiers.

The brutal combat is portrayed in exact and frightening detail. The sounds of warfare penetrate the air as cannons fire, planes zoom overhead, grenades explode, and machine guns rapidly fire shots in all directions. The soldier hides behind the ruins of a demolished building and peers into his scope. As the thick black smoke from a recent grenade explosion clears, the faint outline of an enemy combatant appears with weapon in hand. Holding his rifle steadily, the hero squeezes the trigger.[1]

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."[2] The Constitution protects speech in a novel or a periodical that portrays exploits identical to those of the hypothetical protagonist.[3] When a group of live actors performs this same scene, the Constitution undoubtedly protects the narrative as a form of expression.[4] Courts invariably hold that the same scene in a movie or on television warrants protection as free speech.[5] Courts would likely view this scene as constitutionally protected speech if it was part of the content of an Internet site.[6] However, if the same events had

1. The Author loosely bases the description of this scene on a summary of the Xbox game MEDAL OF HONOR FRONTLINE (Electronic Arts, Inc. 2002). Ricardo Torres, *Medal of Honor Frontline*, Gamespot, *at* http://www.gamespot.com/xbox/action/medalofhonorfrontline/preview_2895660.html (Oct. 24, 2002).

2. U.S. CONST. amend. I.

3. *See* Grosjean v. Am. Press Co., 297 U.S. 233, 243 (1936).

4. *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 547, 552 (1975).

5. *E.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) (finding that motion pictures are "within the free speech and free press guaranty of the First and Fourteenth Amendments").

6. *See* Ashcroft v. ACLU, 535 U.S. 564, 566 (2002) (quoting 47 U.S.C. § 230(a)(3) (Supp. V 1994)) (discussing the Internet's use as a "forum for a true diversity of political discourse, unique

appeared in a video game, the First Amendment protections that protect the other media forms may not apply.

Recent federal district and circuit court decisions have been split on the issue of whether video games constitute speech under the First Amendment.[7] The issue arises primarily in the following two contexts: (1) through a merchant's challenge to a local ordinance that restricts children's access to video games or (2) through a tort claim filed against the developer or manufacturer of a video game, alleging that a violent video game influenced a person to commit violent acts.[8] Most courts have "appropriately refused to impose strict product liability" in cases involving information such as the content of video games, which is an intangible contained in a tangible medium.[9] Lacking a clear test from the Supreme Court, the lower courts vary on the applicable standard for determining whether a video game qualifies as speech.[10]

Part I of this Note summarizes the First Amendment jurisprudence regarding different types of expression or media and regarding the standards that courts have established to determine which forms of content constitute speech.[11] Part II reviews the early decisions, which primarily found no expressive content in first-generation video games.[12] Part II also discusses the shift by some courts that have recognized at least the possibility that some video games are speech. Part II concludes with an analysis of recent decisions and the

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opportunities for cultural development, and myriad avenues for intellectual activity"). *But see* Gridiron.com, Inc. v. Nat'l Football League Player's Ass'n, 106 F. Supp. 2d 1309, 1315 (S.D. Fla. 2000) (finding that a merchandising site is not protected speech).

7. *Compare* Interactive Digital Software Ass'n v. St. Louis County, 200 F. Supp. 2d 1126, 1134 (E.D. Mo. 2002) (finding insufficient expressive content in the video games examined and rejecting a case-by-case approach in favor of a blanket approach), *rev'd*, 329 F.3d 954 (8th Cir. 2003), *with* Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264, 1279-80 (D. Colo. 2002) (holding that the video games examined deserve full First Amendment protection and endorsing a factual determination for evaluating each video game for First Amendment applicability).

8. *E.g.*, Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 573 (7th Cir. 2001); Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167, 169 (D. Conn. 2002); *see* Kurtis A. Kemper, Annotation, *First Amendment Protection Afforded to Commercial and Home Video Games*, 106 A.L.R. 5th 337, § 2[a] (2003).

9. James v. Meow Media, Inc., 90 F. Supp. 2d 798, 811 (W.D. Ky. 2000) (quoting RESTATEMENT (THIRD) OF TORTS § 19(a) cmt. d (1998)), *aff'd*, 300 F.3d 683 (6th Cir. 2002).

10. *See supra* note 7.

11. *See infra* Part I.

12. *See infra* Part II.

standards set forth by the courts.[13] Part III evaluates, from both the tort and regulatory perspectives, the impact of recognizing video games as speech and examines policy considerations.[14] Finally, this Note concludes by summarizing the applicable law and by recommending a standard for courts to follow in cases that involve the applicability of the First Amendment to video games.[15] This Note concludes that, given the realities of modern video games and the broad array of expressive and non-expressive content, courts should apply a case-by-case approach in determining whether video games are constitutionally protected speech instead of deciding conclusively that all video games are (or are not) protected speech.[16]

I. SUMMARY OF FIRST AMENDMENT JURISPRUDENCE

A. Media Other Than Video Games

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[17] "The First Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment."[18] "While First Amendment function at the time of its conception is clear, scholars continue to debate the Framers' overarching intent."[19] "[A]s a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"[20] Courts have not limited the constitutional protection to political speech;

13. *See infra* Part II.

14. *See infra* Part III.

15. *See infra* Conclusion.

16. As courts most often examine violent video games, courts will also have to determine whether a violent video game falls within the First Amendment exception for obscene content. This is the subject of extensive scholarship. *See, e.g.*, Elizabeth A. Previte, *Insert Coins to Slay! Regulating Children's Access to Violent Arcade Games*, 10 VILL. SPORTS & ENT. L.J. 69, 76-82 (2003); William Li, Note, *Unbaking the Adolescent Cake: The Constitutional Implications of Imposing Tort Liability on Publishers of Violent Video Games*, 45 ARIZ. L. REV. 467, 477-94 (2003). For a thorough examination of violence and video games, see Kevin W. Saunders, *Regulating Youth Access to Violent Video Games: Three Responses to First Amendment Concerns*, 2003 LAW REV. MICH. ST. U. DETROIT C.L. 51.

17. U.S. CONST. amend. I.

18. Li, *supra* note 16, at 472.

19. Previte, *supra* note 16, at 75.

20. Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983)).

"[e]ven dry information, devoid of advocacy, political relevance, or artistic expression, has been accorded First Amendment protection."[21]

The First Amendment incontrovertibly extends to print media as well as spoken media.[22] In 1952, the United States Supreme Court extended protection to motion pictures.[23] In *Joseph Burstyn, Inc. v. Wilson*,[24] the Court rejected claims that motion pictures "do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit" or that they "possess a greater capacity for evil, *particularly among the youth of a community*, than other modes of expression."[25] Additionally, the Court has reaffirmed this principle by holding that the free speech protection afforded to the print media extends to plays and live performances.[26] Courts have consistently held that Internet sites are speech, although not without exception.[27]

B. Applicable Standard of Review in Video Game Cases

No precise test exists "for determining how the First Amendment protects a given form of expression."[28] The Court has not yet squarely decided that video games may, at least in some

21. Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167, 179 (D. Conn. 2002) (quoting Universal City Studios, Inc. v. Corley, 273 F.3d 429, 446 (2d Cir. 2001)); *see also* Winters v. New York, 333 U.S. 507, 510 (1948) (stating that the "line between the informing and the entertaining is too elusive for the protection of [free speech]" and that "[w]hat is one man's amusement, teaches another's doctrine"); Am. Amusement Mach. Ass'n v. Kendrick, 115 F. Supp. 2d 943, 954 (S.D. Ind. 2000) (finding that not all protected expression lies at the core of the First Amendment and "thus, even if . . . video games can be labeled 'low value' speech, they are entitled to protection under the *expansive* reach of the First Amendment" (emphasis added)), *rev'd and remanded*, 244 F.3d 572 (7th Cir. 2001).

22. U.S. CONST. amend. I.

23. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) ("The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.").

24. 343 U.S. 495 (1952).

25. *Id.* at 501-02 (emphasis added).

26. *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557-58 (1975) (finding that theater, although it mixes speech with live action, deserves no less protection than books or words alone).

27. *See* Reno v. ACLU, 521 U.S. 844 (1997) (striking down the Communications Decency Act of 1996, 47 U.S.C. § 223 (Supp. II 1994), which regulated indecent material on the Internet). *But see* Gridiron.com, Inc. v. Nat'l Football League Player's Ass'n, 106 F. Supp. 2d 1309, 1315 (S.D. Fla. 2000) (finding that a merchandising site was not free speech because it lacked sufficient content and expression to qualify for constitutional protection).

28. Am. Amusement Mach. Ass'n v. Kendrick, 115 F. Supp. 2d 943, 952 (S.D. Ind. 2000), *rev'd and remanded*, 244 F.3d 572 (7th Cir. 2001).

circumstances, constitute speech under the First Amendment. Finding no direct guidance, most lower courts considering the issue rely on *Southeastern Promotions, Ltd. v. Conrad*,[29] a case in which the Court held that "[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it," as a guideline for determining whether to extend First Amendment protection to any new or existing medium like video games.[30] Unfortunately, lower courts have not consistently interpreted the Supreme Court's guidance.[31] To fall within the First Amendment, entertainment content like video games "must be designed to communicate or express some idea or some information"; courts will not afford a presumption that all conduct is expressive.[32]

II. VARYING APPROACHES TO WHETHER VIDEO GAMES ARE CONSTITUTIONALLY PROTECTED FREE SPEECH[33]

A. The Courts Support Movements to Curb the Effects of Pac-Man *Fever: The Early Decisions*

When video games began to enjoy mass appeal in the early 1980s, federal and state courts consistently held that video games are not speech.[34] In those cases, the courts upheld local zoning ordinances and other government restrictions on access to video games.[35] The earliest decisions simply held that *all* video games were "pure entertainment with no informational element" and thus were not

29. 420 U.S. 546 (1975).

30. *Id.* at 557.

31. *Compare, e.g., Kendrick*, 115 F. Supp. 2d 943, *with* Interactive Digital Software Ass'n v. St. Louis County, 200 F. Supp. 2d 1126 (E.D. Mo. 2002), *rev'd*, 329 F.3d 954 (8th Cir. 2003).

32. Caswell v. Licensing Comm'n, 444 N.E.2d 922, 925 (Mass. 1983); *Interactive Digital Software Ass'n*, 200 F. Supp. 2d at 1132 (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 n.5 (1984)).

33. For a comprehensive annotation of "state and federal cases in which the courts have discussed the extent to which commercial and home video games are protected under the First Amendment," see Kemper, *supra* note 8, § 1(a).

34. *E.g.*, Malden Amusement Co. v. City of Malden, 582 F. Supp. 297, 299 (D. Mass. 1983); Am.'s Best Family Showplace Corp. v. City of New York, Dep't of Bldgs., 536 F. Supp. 170, 174 (E.D.N.Y. 1982); City of Warren v. Walker, 354 N.W.2d 312, 316-17 (Mich. Ct. App. 1984); City of St. Louis v. Kiely, 652 S.W.2d 694, 697 (Mo. Ct. App. 1983).

35. *See, e.g., Malden Amusement Co.*, 582 F. Supp. 297; *Am.'s Best Family Showplace Corp.*, 536 F. Supp. 170; *Walker*, 354 N.W.2d 312; *Kiely*, 652 S.W.2d 694.

speech because they more closely resembled a "pinball game, a game of chess, or a game of baseball."[36] These early decisions established a precedent that some communicative aspect must be apparent in a medium for courts to afford First Amendment protection to that medium, although the Supreme Court has never imposed this restriction.[37] While the available technology severely constrained the communicative aspects of early video games, some decisions recognized that, as technology increased, there would be a time in the future when video games might contain sufficient expressive elements to qualify as speech.[38] However, the courts that envisioned the possibility of certain video games achieving the status of free speech still recognized that "technological advancement alone . . . does not impart First Amendment status to what is an otherwise unprotected game."[39]

This approach continued into the early 1990s, when the United States Court of Appeals for the Seventh Circuit decided in *Rothner v. City of Chicago*[40] not to extend constitutional protection to video games because the record lacked sufficient evidence of communicative elements in the games examined.[41] However, the court in *Rothner* recognized:

> On the basis of the complaint alone, we cannot tell whether the video games at issue here are simply modern day pinball machines or whether they are more sophisticated presentations

36. *Am.'s Best Family Showplace Corp.*, 536 F. Supp. at 174.

37. David C. Kiernan, Note, *Shall the Sins of the Son Be Visited upon the Father? Video Game Manufacturer Liability for Violent Video Games*, 52 HASTINGS L.J. 207, 212 (2000).

38. *E.g.*, Marshfield Family Skateland, Inc. v. Town of Marshfield, 450 N.E.2d 605, 609-10 (Mass. 1983) (recognizing that "in the future video games which contain sufficient communicative and expressive elements may be created" but finding that not all games will garner protection and that the video games presented in the record lacked the sufficient communicative elements); *see also* Tommy & Tina Inc. v. Dep't of Consumer Affairs, 459 N.Y.S.2d 220, 227 (N.Y. Sup. Ct. 1983) (affirming the majority view of not recognizing video games as speech for the video games at issue but acknowledging that "games . . . of a different nature" may garner First Amendment protection).

39. Caswell v. Licensing Comm'n, 444 N.E.2d 922, 927 (Mass. 1983).

40. 929 F.2d 297 (7th Cir. 1991).

41. *See id.* at 303 (declining to decide whether to extend protection to video games but upholding an ordinance prohibiting minors from playing video games during school hours). Few courts in the 1990s "squarely addressed the issue," although the decade was "a period of substantial innovation in the video game industry." Am. Amusement Mach. Ass'n v. Kendrick, 115 F. Supp. 2d 943, 951 (S.D. Ind. 2000), *rev'd and remanded*, 244 F.3d 572 (7th Cir. 2001).

> involving storyline and plot that convey to the user a significant artistic message protected by the [F]irst [A]mendment. Nor is it clear whether these games may be considered works of art [*sic*]. To hold on this record that *all* video games—no matter what their content—are *completely* devoid of artistic value would require us to make an assumption entirely unsupported by the record and *perhaps* totally at odds with reality.[42]

Although this discussion is dicta, it opened the door for the court in *American Amusement Machine Association v. Kendrick*[43] to hold affirmatively that at least some video games contain constitutionally protected free speech.[44]

B. Kendrick *Hits the Reset Button on the Common Law Precedent*

The decision by the United States District Court for the Southern District of Indiana in *Kendrick* marked the turning point in the common law view on video games.[45] Where the court in *Rothner* declined to decide the issue but merely recognized the possibility that contemporary video games may contain sufficient communicative content to afford them constitutional protection, the court in *Kendrick* more positively held that technological advancements have brought at least some video games into the ambit of constitutional speech.[46]

In *Kendrick*, a local ordinance required parental permission for minors to play or watch video games that contained content that was "'harmful to minors,'" games that "include[d] either 'strong sexual content' or 'graphic violence.'"[47] Video game manufacturers challenged the restrictions on graphically violent video games as a

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42. *Rothner*, 929 F.2d at 303.
43. 115 F. Supp. 2d 943 (S.D. Ind. 2000), *rev'd and remanded*, 244 F.3d 572 (7th Cir. 2001).
44. *Id.* at 954.
45. *See id.* at 953.
46. *Id.* at 951-52. The court adopted the plaintiffs' argument that "video games of the year 2000 have gone far beyond the simple displays in 'Space Invaders' and 'Pac-Man,' and that many of today's games are highly interactive versions of movies and storybooks, replete with digital art, music, complex plots, and character development," rejecting the government's proposition that video games are still "most closely analogous to mechanical pinball machines or shooting galleries at a local fair." *Id.*
47. *Kendrick*, 115 F. Supp. 2d at 945. The ordinance in question also prohibited minors from playing video games during school hours unless accompanied by a parent, guardian, or custodian. *Id.* at 984.

content-based restriction on speech that violates the First Amendment.[48] After reviewing the development process of the game from "concept art" to finished product and evaluating (1) the increasing complexity of video games and (2) the audio and visual presentation of the modern video games, the court determined that, "[a]s a general matter, video games will be protected under the First Amendment only if they include sufficient communicative, expressive, or informative elements to fall at least within the outer limits of constitutionally protected speech."[49] The court refused to allow or deny categorical First Amendment protection for video games as a class but instead "discuss[ed] the actual evidence presented by the parties" because "[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it[because] each may present its own problems."[50] Thus, the court determined that a case-by-case factual approach evaluating the communicative aspects of each video game is the approach most consistent with the United States Supreme Court's First Amendment guidance as articulated in *Southeastern Promotions, Ltd. v. Conrad*.[51]

The court in *Kendrick* then examined the individual games in question and failed to find a "meaningful distinction between the Gauntlet [fantasy role-playing] game's ability to communicate a story line and that of a movie, television show, book, or—perhaps the best analogy—a comic book."[52]

The court rejected the idea that the higher level of interaction in video games distinguishes them from other media because many protected forms of expression, like town hall meetings, theatrical

48. *Id.* at 946.

49. *Id.* at 948-49, 952. The court explained that the process begins as a "creative concept" in the mind of the developer and entails "[t]eams of artists draw[ing] sketches of the characters [to] create 'story boards.'" *Id.* at 948. Many contemporary video games contain three-dimensional simulated environments, full motion videos "similar to the technology used in computer-animated feature films," and running times of up to eight hours or more. *Id.* at 949.

50. *Id.* at 952 (second alteration in original) (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975)) (finding that "[a]ny given form of entertainment, activity, or interaction may or may not be protected under the First Amendment" and discussing "the actual evidence presented by the parties").

51. *See id.*; *see also Conrad*, 420 U.S. at 557.

52. *Kendrick*, 115 F. Supp. 2d at 952 (referring to the *Gauntlet* game series, specifically GAUNTLET DARK LEGACY (Midway Home Entm't Inc. 2001)).

performances, and some fantasy books that require the reader to "make choices at critical points in the narrative," are highly interactive.[53] After finding that video games widely vary in the amount of expressive content found in each game, the court concluded that some video games from the record qualified as constitutionally protected speech, while the speech elements of other video games presented were so inconsequential as to prevent them from garnering protection.[54] The district court denied the plaintiffs' motion for a preliminary injunction, however, because the court felt that the City had a legitimate basis for regulation and that "the Ordinance [was] carefully tailored to serve that interest without infringing other First Amendment issues."[55]

In reviewing the *Kendrick* decision, the United States Court of Appeals for the Seventh Circuit did not disturb the district judge's conclusion that some, but not all, games may receive First Amendment protection.[56] In fact, because the ordinance may be an overly broad regulation on protected speech, the circuit court overturned the district court's decision to deny the plaintiffs injunctive relief.[57] In writing for the majority, Judge Posner asserted that nothing about video games sufficiently distinguishes them from other forms of literature or media to justify allowing the government's regulation of them in this broad manner.[58] Judge Posner found "age-old themes of literature, and ones particularly appealing to the young," in one of the video games in the record.[59] Interestingly, the district court also reviewed that same "first person shooter" game and determined, by focusing on the plot elements, that it contained only marginal expressive content.[60] The circuit court did

53. *Id.* at 952, 953 n.4.

54. *See id.* at 954 ("[The] speech elements of [some video games] are relatively inconsequential.").

55. *See id.* at 955.

56. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001).

57. *Id.* at 580.

58. *Id.* at 577-78.

59. *Id.* In THE HOUSE OF THE DEAD (Sega of Am., Inc. 1997), the player defends himself against "a seemingly unending succession of hideous axe-wielding zombies, the living dead conjured back to life by voodoo." *Id.* at 577. Judge Posner made it clear that *The House of the Dead* "is not distinguished literature." *Id.* at 578.

60. *Compare* Am. Amusement Mach. Ass'n v. Kendrick, 115 F. Supp. 2d 943, 954 (S.D. Ind. 2000) (finding the plot and speech elements of THE HOUSE OF THE DEAD 2 (Sega of Am., Inc. 1998)

agree with the lower court, however, that interaction does not distinguish video games from other expressive content: "All literature (here broadly defined to include movies, television [programs], . . . other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive."[61]

C. *Responses to* Kendrick

1. *Advancing the Assertion that Video Games Are Speech*

In *Sanders v. Acclaim Entertainment, Inc.*,[62] the United States District Court for the District of Colorado supported the court's determination in *Kendrick* that First Amendment protection extends to some video games by holding that the plaintiffs "failed to show that video games deserve anything less than full First Amendment protection."[63] The plaintiffs were the family members of a teacher murdered at Columbine High School when two seventeen-year-old students shot and killed twelve people in a "deadly assault" on the school.[64] The plaintiffs brought suit against (1) movie producers and distributors, (2) video game manufacturers and distributors, and (3) pornographic Web sites, alleging that the defendants' products presented an unreasonable risk of harm by unduly influencing minors and by desensitizing minors to violence.[65]

The district court found the plaintiffs' claims that the First Amendment does not protect video games unpersuasive, citing to the

"relatively inconsequential"), *rev'd and remanded*, 244 F.3d 572 (7th Cir. 2001), *with Kendrick*, 244 F.3d at 577 (finding that *The House of the Dead* contained themes of "[s]elf-defense, protection of others, dread of the 'undead,' [and] fighting against overwhelming odds").

61. *Kendrick*, 244 F.3d at 577.

62. 188 F. Supp. 2d 1264 (D. Colo. 2002).

63. *Id.* at 1279.

64. *Id.* at 1268.

65. *Id.* at 1269-70. The plaintiffs made the following allegation:

> [The video games] made violence pleasurable and attractive[,] . . . disconnected the violence from the natural consequences thereof, thereby causing [the assailants] Harris and Klebold to act out the violence[,] . . . [and] trained [them] how to point and shoot a gun effectively without teaching either of them any of the constraints, responsibilities, or consequences necessary to inhibit such an extremely dangerous killing capacity.

Id. at 1269 (some alterations in original) (citing Amended C/O ¶ 25).

Seventh Circuit precedent in *Kendrick*.[66] The court here examined each game as was done in *Kendrick*.[67] The court instead afforded constitutional protection to *all* video games at issue by finding that the plaintiffs failed to meet their burden of "show[ing] that video games deserve anything less than full First Amendment protection."[68] Thus, the court in *Sanders* placed the burden of showing that the First Amendment does not protect video games on the plaintiff.[69]

In *Wilson v. Midway Games, Inc.*,[70] which the United States District Court for the District of Connecticut decided in the same month as the United States District Court for the District of Colorado decided *Sanders*, the court dismissed a plaintiff's assertion that the interactive nature of video games takes them out of the realm of constitutional speech.[71] Instead, the court agreed with the Seventh Circuit precedent that the ability of some video games to convey a storyline is indistinguishable from the ability of movies, television programs, or Web sites to do the same; therefore, courts should make a factual determination for each game to decide whether that game contains sufficient expressive content to qualify as protected speech.[72] The court reasoned that "the label 'video game' is not talismanic, automatically making the object to which it is applied either [protected] speech or not [protected] speech."[73]

In *Wilson*, a deceased child's parent sued a video game manufacturer, alleging that video games influenced her son's murderer to kill her son.[74] She alleged that the perpetrator, a friend of the victim, was so obsessed with the *Mortal Kombat*[75] fighting video

66. *Id.* at 1279 (citing Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577-78 (7th Cir. 2001)).

67. *Kendrick*, 244 F.3d at 577-78; Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264, 1279 (D. Colo. 2002).

68. *See Sanders*, 188 F. Supp. 2d at 1279.

69. *Id.*

70. 198 F. Supp. 2d 167 (D. Conn. 2002).

71. *See id.* at 181. The Internet, also an interactive medium, receives constitutional protection. *Id.* at 180. Furthermore, "[t]he nature of the interactivity [described in the complaint] cut[s] in favor of First Amendment protection, inasmuch as it is alleged to *enhance* everything expressive and artistic about [the game]." *Id.* at 181.

72. *Id.* at 181.

73. *Id.*

74. *Id.* at 169.

75. MORTAL KOMBAT (Midway Home Entm't, Inc. 1993).

game that he believed he was a character in the game.[76] The friend killed the plaintiff's son with a maneuver used by a *Mortal Kombat* character: placing the victim in a headlock and stabbing him in the chest.[77]

The court quoted the Seventh Circuit Court of Appeals' language in *Kendrick* that a video game's level of interaction actually enhanced the communicative quality of the video game, just as the most expressive television or print media often invoke interaction or emotion with the viewer.[78] The court in *Wilson* applied the standard advanced by the court in *Kendrick*.[79] The court adopted the case-by-case determination for evaluating each video game, in which "video games that are merely digitized pinball machines are not protected speech[and] those that are analytically indistinguishable from other protected media, such as motion pictures or books, which convey information or evoke emotions by imagery, are protected under the First Amendment."[80] Finding that the First Amendment protection applied to the video game at issue, the court granted the defendant's motion to dismiss for failure to state a claim.[81]

2. *Declining to Follow* Kendrick*'s Assertion that Video Games Are Speech*

On April 19, 2002, the United States District Court for the Eastern District of Missouri declined to follow the *Kendrick* test in *Interactive Digital Software Association v. St. Louis County*.[82] In *Interactive Digital Software Association*, which involved challenges to a local ordinance restricting minors' access to video games, the district court criticized the *Kendrick* ad hoc approach as unprecedented in the area of First Amendment speech.[83] The court

76. *Wilson*, 198 F. Supp. 2d at 169.

77. *Id.* at 170.

78. *Id.* at 180 (quoting Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001)).

79. *See id.* at 181.

80. *Id.*

81. *Id.* at 182.

82. 200 F. Supp. 2d 1126 (E.D. Mo. 2002), *rev'd*, 329 F.3d 954 (8th Cir. 2003).

83. *Id.* at 1134. The court stated that "[t]he First Amendment does not allow us to review books, magazines, motion pictures, or music and decide that some of them are speech and some of them are

instead called for a bright line rule under which video games as a medium either categorically "provide[] sufficient elements of communication and expressiveness to fall within the scope of the First Amendment" or, as a whole, fall outside of the constitutional scope.[84] Thus, the court determined that the Supreme Court's guidance in *Conrad*, which called for independent evaluation of each "medium of expression" applied to each *type* of medium or content and not, as *Kendrick* proposed, to each *individual* work within that category of content.[85]

Furthermore, the district court examined the video games on the record and concluded that technological advances alone did not afford First Amendment protection to the games.[86] While the court in *Kendrick* asserted that the level of interaction enhanced the communicative aspects of video games, this court found that communication that is "singularly in furtherance of the game" or that is "totally divorced from a purpose of expressing ideas, impressions, feelings, or information unrelated to the game itself" falls outside the realm of protected speech.[87] The court further asserted that violence, a common characteristic in the games on record, does not by itself create expression.[88]

The court also dismissed analogies to movies or television programs because the purpose of those media, unlike video games, is to "'entertain as well as to inform.'"[89] Unlike the court in *Kendrick*,

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not. It appears to the Court that either a 'medium' provides sufficient elements of communication . . . or it does not." *Id.*

84. *Id.*

85. *See id.*; Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975).

86. *Interactive Digital Software Ass'n*, 200 F. Supp. 2d at 1134 (reviewing four video games). The court did note that the "technology employed in creating video games has changed drastically in the last few decades" but, citing the court in *Caswell v. Licensing Comm'n*, 444 N.E.2d 922, 927 (Mass. 1983), determined that "technological advancement alone does not impart First Amendment status to what is an otherwise unprotected game." *Interactive Digital Software Ass'n*, 200 F. Supp. 2d at 1131, 1133.

87. *See Interactive Digital Software Ass'n*, 200 F. Supp. 2d at 1134 (quoting There to Care, Inc. v. Comm'r of the Ind. Dep't of Revenue, 19 F.3d 1165, 1167 (7th Cir. 1994)) (analogizing video games to "Bingo," an interactive game that garners no First Amendment protection).

88. *Interactive Digital Software Ass'n*, 200 F. Supp. 2d at 1135.

89. *Id.* at 1132 (emphasis omitted) (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952)). Analyzing the United States Supreme Court First Amendment cases, the court reasoned:

> [I]f an entirely new "medium" is being given First Amendment protection, there does need to be at least some type of communication of ideas in that medium. It has to be designed to express or inform, and there has to be a likelihood that others will understand that there has been some type of expression.

the court in *Interactive Digital Software Association* failed to find relevance in the video game design process, which may entail scripts and artistic collaboration, because the court evaluated the final product and not the design process.[90]

The court, after rejecting the *Kendrick* factual determination process, applied a categorical analysis in determining that video games are not constitutionally protected free speech.[91] One concept that especially troubled the court was the idea that taking unprotected conduct like baseball and digitizing that conduct into a baseball video game would afford the digitized form of the activity constitutional protection while the underlying conduct, baseball, remained unquestionably unprotected.[92] The court determined that the plaintiffs did not meet their "burden of showing that video games are expressive so as to trigger First Amendment protection."[93]

3. *Declining to Answer the Question*

In *James v. Meow Media, Inc.*,[94] another tort case involving parents of victims of a school shooting, the United States Court of Appeals for the Sixth Circuit recognized video games as protected speech, but in a narrower context.[95] In August 2002, the Sixth Circuit decided that "the First Amendment protects video games in [a limited] sense uniquely relevant to" the particular lawsuit.[96] However, the court declined to fully decide the issue as to whether video games receive categorical constitutional protection or even as to whether the First Amendment protects the games in the record.[97]

Id. at 1132-33.

90. *Id.* at 1135 (holding that the court must look at video games "in their context" and that background expressions could make nearly any product speech). The court emphasized that every product has a design process that may involve "some kernel of expression," and thus, the rationale in *Kendrick* on that process could open free speech protection to "every automobile, gadget, or machine . . . [as] a form of expression." *Id.*

91. *Id.* at 1134-35.

92. *Id.* at 1134.

93. *Id.* at 1141.

94. 300 F.3d 683 (6th Cir. 2002).

95. *Id.* at 696.

96. *Id.*

97. *Id.*

In *James*, the plaintiffs claimed that the defendants' video games communicated a "disregard for human life and an endorsement of violence that persuaded [the shooter] to commit three murders."[98] The court stated that there are "features of video games which are not terribly communicative, such as the manner in which the player controls the game."[99] However, the court had "little difficulty" extending the First Amendment to the narrow, communication-only aspect of the video games.[100]

The circuit court, however, declined to decide the "thorny issue[]" of whether video games, either categorically or individually, garner First Amendment protection.[101] While the court examined the precedent and applied constitutional protection in this narrow context, the court emphasized that its decision "should not be interpreted as a broad holding on the protected status of video games."[102]

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98. *Id.* One witness' statements even indicated that the video games provided the assailant with training for the assault:

> [He] stood, never moving his feet, holding the gun in two hands, never firing far to the left or right, never far up or down, with a blank look on his face. He was playing a video game. Simply shooting everything that popped up on this screen. [*sic*] Just like he had done countless times before. [*sic*]

Clay Calvert, *Violence, Video Games, and a Voice of Reason: Judge Posner to the Defense of Kids' Culture and the First Amendment*, 39 SAN DIEGO L. REV. 1, 22 (2002) (quoting Dave Grossman, *Teaching Kids to Kill, in* SHOCKING VIOLENCE: YOUTH PERPETRATORS AND VICTIMS—A MULTIDISCIPLINARY PERSPECTIVE 17, 17-18 (Rosemarie Scolaro Moser & Corinne E. Frantz eds., 2000)).

99. *James*, 300 F.3d at 696.

100. *Id.*

101. *Id.*

102. *Id.* The district court had similarly declined to decide the issue of whether video games are First Amendment speech, stating that "[w]here there is no need to decide a constitutional question, it is a venerable principle of this Court's adjudicatory processes not to do so for '[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'" James v. Meow Media, Inc., 90 F. Supp. 2d 798, 818 (W.D. Ky. 2000) (quoting Ashwander v. TVA, 297 U.S. 288 (1936)), *aff'd*, 300 F.3d 683 (6th Cir. 2002).

III. POLICY CONSIDERATIONS

A. Ramifications

1. Tort Ramifications[103]

If video games are speech under the First Amendment, a state's remedy for tort actions must not violate the defendant's free speech rights.[104] This limitation does not mean that plaintiffs will not have a tort remedy; rather, "certain speech, while fully protected when directed to adults, may be restricted when directed towards minors."[105] However, the court in *Sanders* cautioned that imposing liability on video game manufacturers is practically unworkable because liability would "obligate these [d]efendants, indeed all speakers, to anticipate and prevent the idiosyncratic, violent reactions of unidentified, vulnerable individuals to their creative works."[106]

2. Governmental Regulation Ramifications

If the courts ultimately decided that video games are speech, it would impede a legislature's ability to broadly regulate access to video games or to video game content by ordinance because that ordinance would be subject to strict scrutiny if it attempted to regulate protected speech.[107] For the ordinance in question to survive strict scrutiny, the government must show a compelling interest in regulating that type of activity or speech and show that the regulations are "narrowly tailored to advance that interest."[108] Consequently, the government could continue to regulate video

103. For a detailed discussion of the tort implications of violent video games, see Li, *supra* note 16.

104. *See* Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167, 178 (D. Conn. 2002) (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).

105. *James*, 300 F.3d at 696 (citing Sable Communications v. FCC, 492 U.S. 115, 126 (1989)).

106. Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264, 1275 (D. Colo. 2002); *see also* Watters v. TSR, Inc., 904 F.2d 378, 381 (6th Cir. 1990).

107. *See, e.g.*, Interactive Digital Software Ass'n v. St. Louis County, 200 F. Supp. 2d 1126, 1135 (E.D. Mo. 2002), *rev'd*, 329 F.3d 954 (8th Cir. 2003). In determining whether to uphold an ordinance regulating free speech, "content-based regulations of expression must survive strict scrutiny unless the [regulated] expression fits within one of the narrowly limited classes of speech that lack full First Amendment protection." *Id.* For a discussion of classes of speech that fall outside the scope of the First Amendment, see Kiernan, *supra* note 37, at 221-35.

108. *Interactive Digital Software Ass'n*, 200 F. Supp. 2d at 1136.

games by surviving strict scrutiny or, more likely, by regulating "'graphic violence' in the games offered to children."[109]

If video games do not qualify as speech, the government has a lower hurdle to cross in order to pass judicial review of any statute regulating video games.[110] The court will instead afford the video game little or no constitutional protection.[111]

B. Policy Considerations

According to one court, the danger of failing to recognize the content of video games as protected free speech and of allowing regulation, through either government-imposed content-based restrictions or the availability of a civil tort remedy, clearly demonstrates the potential for a "devastatingly broad chilling effect on expression of all forms."[112] Affording some expressive video games constitutional protection still allows for the possibility of a narrowly tailored statute to regulate obscene video games because obscene speech garners a lower level of protection than non-obscene speech.[113]

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109. Am. Amusement Mach. Ass'n v. Kendrick, 115 F. Supp. 2d 943, 954 (S.D. Ind. 2000), *rev'd and remanded*, 244 F.3d 572 (7th Cir. 2001).

110. *See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969); United States v. O'Brien, 391 U.S. 367 (1968).

111. *See generally Brandenburg*, 395 U.S. 444; *O'Brien*, 391 U.S. 367. For a discussion of the regulatory possibilities, see generally Kevin E. Barton, Note, *Game Over! Legal Responses to Video Game Violence*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 133 (2002).

112. James v. Meow Media, Inc., 90 F. Supp. 2d 798, 819 (W.D. Ky. 2000) (citing Watters v. TSR, Inc., 715 F. Supp 819, 822 (W.D. Ky. 1989), *aff'd on other grounds*, 904 F.2d 378 (6th Cir. 1990)), *aff'd*, 300 F.3d 683 (6th Cir. 2002). The court in *Watters* expressed its concern regarding the broad effect on speech:

> The libraries of the world are a great reservoir of works of fiction and nonfiction which may stir their readers to commit heinous acts of violence or evil. However, ideas expressed in one work[,] which may drive some people to violence or ruin, may inspire others to feats of excellence or greatness. As was stated by the second Mr. Justice Harlan, 'one man's vulgarity is another man's lyric.' Atrocities have been committed in the name of many of civilization's great religions, intellectuals, and artists, yet the [F]irst [A]mendment does not hold those whose ideas inspired the crimes to answer for such acts. To do so would be to allow the freaks and misfits of society to declare what the rest of the country can and cannot read, watch[,] and hear.

Watters, 715 F. Supp. at 822.

113. *See Interactive Digital Software Ass'n*, 200 F. Supp. 2d at 1135 ("[C]ontent-based regulations of expression must survive strict scrutiny unless the expression fits within one of the narrowly limited classes of speech that lack full First Amendment protection.").

Some commentators argue that industry self-regulation may have already displaced the need for government intervention. Although the government may survive court scrutiny by narrowly tailoring a specific statute that prevents minors from having access to obscene games, all video games must comply with the standards set by the Electronic Software Rating Board ("ESRB") prior to release.[114] According to the industry's standard, no video game "can be more graphic or vulgar than an R-rated movie or [an] album with explicit lyrics."[115] Some commentators have even suggested tying legislation that would restrict access to violent video games to the ESRB ratings.[116]

Furthermore, retailers retain the discretion to refrain from placing video games on the shelf if they do not approve of the game's content. For example, retailers including Wal-Mart and Best Buy opted in 2002 not to stock the controversial *BMX XXX*,[117] even though the game passed the ESRB guidelines with an "M" rating, which is the highest rating on the ESRB system; retailers may sell games that are rated "M" only to persons over 17 years old.[118] The publisher of *BMX XXX*, Acclaim Entertainment, Inc., which was also responsible for the home versions of two of the highly controversial *Mortal Kombat* games in the mid-nineties, responded to the retailers' refusal to carry the explicit bike riding game and to the retailers'

114. George Deutsch, *Nudity, Vulgarity and All Things 'Mature,'* The Battalion Online, http://www.thebatt.com/news/2002/11/08/opinion/nudity.vulgarity.and.all.things.mature_515806.shtml (Nov. 8, 2002). The government created the ESRB in response to the highly controversial *Mortal Kombat* video game and a game rating campaign spearheaded by United States Senator Joseph Lieberman. *Id.*

115. *Id.*

116. *E.g.*, Li, *supra* note 16, at 503-04; Bonnie B. Phillips, Note, *Virtual Violence or Virtual Apprenticeship: Justification for the Recognition of a Violent Video Game Exception to the Scope of First Amendment Rights of Minors*, 36 IND. L. REV. 1385, 1411 (2003).

117. BMX XXX (Acclaim Entm't 2002).

118. Deutsch, *supra* note 114. *BMX XXX* is a bike riding game filled with "raunchy language" and "full motion video[s] of strippers." Jeff Gerstmann, *BMX XXX*, Gamespot, *at* http://www.gamespot.com/xbox/sports/bmxxxx/review.html (Nov. 11, 2002). In addition to major retailers refusing to sell the product in the United States, Australia has completely banned the sale of this video game within its borders. Paul Presley, *BMX XXX: Acclaim Speaks Out, Provides New Pics, Gets Banned*, Computer and Video Games.com, *at* http://www.computerandvideogames.com/r/?page=http://www.computerandvideogames.com/news/news_archive.php (Oct. 18, 2002). Australia had also banned the infamous GRAND THEFT AUTO III (Rockstar Games 2001) earlier that year. *Id. Grand Theft Auto III* was "[r]eferred to by critics as a 'virtual apprenticeship in crime,' [because it] requires players to 'run prostitutes, deliver drugs, make gangland hits and generally flout the law.'" Phillips, *supra* note 116, at 1392.

refusal to accept the ESRB industry regulation by stating that "there is a general, unfair characterization of the interactive entertainment industry[,] and as a result, [Acclaim's] product is being held to an entirely different standard than other entertainment media with comparable content, including movies, television[programs,] and radio."[119] Acclaim Co-Chairman and CEO Greg Fischbach even compared the notorious product to "movies like American Pie[] and TV shows like The Sopranos and Sex and the City."[120] Acclaim Entertainment defends *BMX XXX*'s content on the grounds that the game is not targeting video game players under 17 years old, and it claims that the ESRB "M" rating ensures that retailers will not sell the adult-oriented product to minors.[121]

CONCLUSION

A. Summary of Existing Law

The United States Supreme Court has provided that courts are free to evaluate "[e]ach medium of expression . . . by standards suited to it" in determining whether to extend free speech protection to that medium.[122] In applying this guidance, courts have not limited First Amendment protection to political speech but have extended the protection to various new types of media like movies and Internet Web sites.[123] While courts in the earlier cases that examined the issue of whether video games receive constitutional free speech protection consistently held that video games were not protected speech because they lacked an intent to inform or because they amounted to electronic pinball, the Seventh Circuit recognized that at least some video games garner First Amendment protection.[124] The discussion in

119. *Acclaim Responds to Controversy Surrounding BMX XXX*, PC vs. Console, *at* http://www.pcvsconsole.com/news/news.php?nid=1573 (Oct. 17, 2002).

120. *Id.*

121. *Id.* The product's official Web site asks visitors to verify their age upon arriving at the site. *See BMX XXX*, Acclaim Entm't, Inc., *at* http://www.bmxxxx.com. If visitors click on the "17 years of age or older" link, the site directs their browsers to the *BMX XXX* product Web site. *Id.* If visitors click on the "younger than 17" link, the site redirects them to Acclaim's main Web site. *Id.*

122. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975).

123. *See supra* Part I.A.

124. *See supra* Part II.A-B.

Kendrick has produced mixed responses by the district and circuit courts.[125]

While some courts have advanced *Kendrick*'s assertion that the First Amendment protects some video games, one court has completely rejected the approach, and another has declined to decide either way.[126] In addition, courts are split on whether to take a categorical approach and hold that all video games either are or are not speech.[127] Other courts, like *Kendrick*, advocate a more flexible case-by-case factual determination of the video games at issue to determine whether they are protected speech.[128]

The applicability of the First Amendment to video games determines the availability of tort remedies to families of victims claiming that video games influenced a person to murder the victim.[129] In addition, the determination of whether a video game is free speech sets the standard of scrutiny for governmental regulations on video games, which ranges from the heightened strict scrutiny standard for protected content to lower, more achievable standards for unprotected content.[130]

B. A Recommended Approach

This section develops a recommended approach for courts to follow in evaluating whether a video game contains protected speech.

1. How to Evaluate Video Games

The first step in the analysis is to determine how, whether categorically or on an individual basis, to evaluate video games. Because only the final product is of significance for evaluation purposes, the design process, no matter how detailed or how similar

125. *See supra* Part II.C.
126. *See supra* Part II.C.1-3.
127. *See supra* Part II.C.1-2.
128. *See supra* Part II.B.
129. *See supra* Part III.A.1.
130. *See supra* Part III.A.2.

to the design process of other protected media, is irrelevant.[131] This makes sense because the design process is likewise irrelevant to other media forms.[132] Additionally, the level of interaction does not define whether a medium contains protected speech.[133] Accordingly, a high level of interaction should not remove a video game from the realm of potentially protected speech.[134]

Technological advances should not on their own make video games protected speech. *Pong* was one of the first video games; it involved two white rectangles representing paddles moving up and down to volley a white block, thus replicating a game of table tennis. Technological advances that allow a programmer to develop a game that simulates table tennis in a three dimensional environment should not logically provide that game with more protection than that provided to *Pong*; the objective remains the same. For example, in a baseball game, the stadium may contain design elements like music and billboards, but the design elements are ancillary to the game's purpose, just as they are in a real game.[135]

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131. *See* Interactive Digital Software Ass'n v. St. Louis County, 200 F. Supp. 2d 1126, 1135 (E.D. Mo. 2002), *rev'd*, 329 F.3d 954 (8th Cir. 2003). *But see* Am. Amusement Mach. Ass'n v. Kendrick, 115 F. Supp. 2d 943, 948-49 (S.D. Ind. 2000), *rev'd and remanded*, 244 F.3d 572 (7th Cir. 2001).

132. *See Interactive Digital Software Ass'n*, 200 F. Supp. 2d at 1134-35.

133. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001).

134. *See id.* Arguably, a high level of interaction may enhance expressive content in media forms generally. *See id.* If, on the other hand, a high level of interaction could preclude First Amendment protection for some video games, then a low level of interaction could theoretically support the notion that other games are protected speech (potential *Conrad* prohibitions aside). While courts have generally examined arcade games, which manufacturers design for constant interaction in relatively short playing periods, some console games are quite different. In contrast to the first person arcade shooters like *House of the Dead 2*, console games like *Final Fantasy VII* involve selecting menu options to determine a character's actions and frequently include cinematic-style scenes and plot elements throughout the game. FINAL FANTASY VII (Squaresoft, Inc. 1997). *Final Fantasy VII* more closely resembles the adventure books that require the reader to make decisions about a character's actions than the games that courts typically evaluate. *See Kendrick*, 244 F.3d at 577; *Kendrick*, 115 F. Supp. 2d at 953 n.4; Li, *supra* note 16, at 476-77. One commentator recently criticized the decision in *Kendrick* on the ground that video games are "entirely interactive." Previte, *supra* note 16, at 92. While this may be true for some games, it is not true for all games, particularly those with more cinematic elements. *See, e.g.*, FINAL FANTASY VII (Squaresoft, Inc. 1997). Many games are far from "pure entertainment." *Contra* Previte, *supra* note 16, at 101. Regardless, the level of interaction should not be the focus of the analysis. *See Kendrick*, 244 F.3d at 577. For a comparison of video games to other interactive activities, see Saunders, *supra* note 16, at 101-05.

135. The court in *Interactive Digital Software Ass'n* devised this analogy with regard to baseball. *See Interactive Digital Software Ass'n*, 200 F. Supp. 2d at 1134-35. However, the court did not apply the analogy to a video game based on a protected medium like a movie. *See id.*

Technological advances, however, have had some significance. In *Ashcroft v. ACLU*,[136] the Supreme Court found the Internet's origin as an information forum significant in holding that Internet content merits free speech protection.[137] Although video games undoubtedly lack an origin as a source of information, the analysis should focus on the medium as it exists today. Focusing on the history would fail to recognize the broader range of content currently available in video games, which technological advances largely made possible.

Having established factors not relevant to the analysis, what are courts left to evaluate? This question may be easier to answer if one follows the Supreme Court's guidance in *Conrad*.[138]

2. *Applying* Conrad

This section begins with a premise upon which all courts can agree: some video games lack sufficient expressive content to be constitutionally protected speech.[139] The Supreme Court has held that courts should evaluate each medium of expression by the standards to which it is best suited.[140] Some have interpreted this standard as requiring courts to make a categorical decision as to a type of medium, and thus, because some video games are unquestionably not protected speech, all video games are not protected speech.[141] Conversely, the court in *Kendrick* interpreted *Conrad* to allow a factual determination as to each video game.[142]

Proponents of the categorical approach would argue that courts do not engage in this type of ad hoc analysis for other forms of media. However, the realities of modern video games may warrant the case-by-case approach. Because video games are digital media, they provide a broad range of expressive content that may not exist in other media. While some video games resemble traditional physical games, others do not. A board game like *Monopoly* strictly limits the

136. 535 U.S. 564 (2002).
137. *See id.*
138. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).
139. *See, e.g., Interactive Digital Software Ass'n*, 200 F. Supp. 2d 1126.
140. *Conrad*, 420 U.S. at 557.
141. *Interactive Digital Software Ass'n*, 200 F. Supp. 2d at 1134.
142. *See* Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 579-80 (7th Cir. 2001).

expressive content to the design of the pieces, and while the game's inventor may have intended the game itself as a political statement on the "evils of land monopolism" and to advocate the single tax, the game's inherent limitations preclude the author from effectively expressing that message.[143] Consequently, the message likely does not reach most players. Likewise, a video game based on *Monopoly*, no matter how artfully rendered, cannot go further in expressing an idea and accordingly deserves no more protection than its physical counterpart. However, all video games are not limited to electronic versions of games like *Monopoly* or table tennis. Some modern video games with extensive cinematic and plot elements more closely resemble movies.[144] One commentator noted:

> If video games simply involved putting in a quarter and watching a story unfold on the screen, the game would be protected, and it should make no difference that the images are produced through the operation of code instead of the projection of light through celluloid. The developer is still providing communication to a human recipient, and that is protected, whatever the medium.[145]

Given the wide range of possibilities, only a case-by-case approach is harmonious with the reality of modern video games and to broadly define free speech.[146]

Returning to the fictitious soldier presented in the introduction, an artist could express a message of the harshness of war through a book like *Band of Brothers*[147] or through a movie like *Saving Private*

143. *See, e.g.*, Burton H. Wolfe, *The Monopolization of Monopoly: Lizzie J. Magie*, *at* http://www.adena.com/adena/mo/mo05.htm (last visited Mar. 15, 2004).

144. *See, e.g.*, FINAL FANTASY VII (Squaresoft, Inc. 1997). Interestingly, the 2003 video game *Enter the Matrix* marked "the first time in videogame history [that] a major Hollywood movie [was] developed in conjunction with the game to create a single, overall entity that must be experienced in its entirety to get the complete picture." Johnny Minkley, *Interview: The Matrix Exposed*, Computer and Video Games.com, *at* http://www.computerandvideogames.com/news/news_archive.php (Feb. 18, 2003).

145. Saunders, *supra* note 16, at 104.

146. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565-66 (1991) (finding sufficient communicative elements in nude dancing to warrant constitutional protection).

147. STEPHEN E. AMBROSE, BAND OF BROTHERS: E COMPANY, 506TH REGIMENT, 101ST AIRBORNE FROM NORMANDY TO HITLER'S EAGLE'S NEST (1991).

Ryan,[148] and the First Amendment would protect each of these.[149] The artist would, however, have difficulty expressing that message in a game of chess, which is also based on war, where the physical limitations and the object of the game would overshadow the expressive elements. The same applies to a video game of chess, and neither would qualify for protection. However, another video game, not merely replicating chess, could contain the elements of a movie like *Saving Private Ryan*, to the extent that the game does not overshadow the expressive elements.[150]

One additional consideration exists. Entertainment speech precedent typically requires a "particularized message" for the court to extend First Amendment protection to a medium, but even if the specific "particularized message" is lacking in video games (and the Seventh Circuit in *Kendrick* would strongly support the idea that at least some contemporary video games satisfy the "particularized message" element), the U.S. Supreme Court has never positively endorsed that requirement.[151] Moreover, the Supreme Court precedent possibly suggests just the opposite: that no particular message is required for a court to extend First Amendment protection to a new form of entertainment media.[152]

148. SAVING PRIVATE RYAN (Universal/MCA 1998).

149. *See supra* notes 3-4 and accompanying text.

150. This is not to say that this type of video game presently exists. As previously discussed, video games like *Final Fantasy VII* are, in many respects, comparable to movies. Perhaps the vast differences between games resembling movies and the games that courts have analyzed can explain recent decisions holding that video games are categorically not speech. *See* Li, *supra* note 16, at 475 (arguing that the games that courts have considered "constituted a tiny sample of the huge universe of video games on the market" and noting that some courts have "applied [their] analysis to the medium as a whole"). *But see* Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001) (finding sufficient expressive content in a first person shooter game examined by the court).

151. Kiernan, *supra* note 37, at 217; *see Kendrick*, 244 F.3d at 577-78; Caswell v. Licensing Comm'n, 444 N.E.2d 922, 925 (Mass. 1983).

152. Kiernan, *supra* note 37, at 217 (citing United States v. O'Brien, 391 U.S. 367 (1968), and Texas v. Johnson, 491 U.S. 397 (1989)).

Courts should follow Judge Posner's case-by-case analysis from *Kendrick* when determining whether the First Amendment protects video games. Given the wide range of content in video games, this approach allows the court to evaluate the medium in the manner best suited to it: by examining the content of each work.

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